

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GOD'S LOVE OUTREACH MINISTRIES, a
California corporation,

Plaintiff,

v.

FOUNDATION CAPITAL RESOURCES,
INC., a Georgia corporation, and
DOES 1-30, inclusive,

Defendants.

No. C 12-185 CW

ORDER DENYING EX
PARTE APPLICATION
FOR TEMPORARY
RESTRAINING ORDER
(Docket No. 4)

In this contract case, Plaintiff God's Love Outreach Ministries seeks specific performance of a commercial property purchase agreement with Defendant Foundation Capital Resources, Inc. concerning real property located at 1237-1239 North Livermore Avenue in Livermore, California. Plaintiff now applies ex parte for a temporary restraining order enjoining Defendant from proceeding with an eviction of tenant St. Matthews Baptist Church of Livermore, Inc. from the subject property.

A temporary restraining order may be issued without providing the opposing party an opportunity to be heard only if "specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A). "The standard for issuance of a temporary restraining order is the same as that for issuance of a preliminary injunction." Burgess v. Forbes, 2009 WL 416843, at *2 (N.D. Cal.). To obtain a preliminary injunction, the moving party

1 must "establish that he is likely to succeed on the merits, that
2 he is likely to suffer irreparable harm in the absence of
3 preliminary relief, that the balance of equities tips in his
4 favor, and that an injunction is in the public interest." Winter
5 v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008).

6 Alternatively, preliminary injunctive relief could be granted
7 when "the likelihood of success is such that serious questions
8 going to the merits were raised and the balance of hardships tips
9 sharply in plaintiff's favor," so long as the plaintiff
10 demonstrates a likelihood of irreparable harm and shows that the
11 injunction is in the public interest. Alliance for the Wild
12 Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (citation
13 and internal quotation and editing marks omitted). In the Ninth
14 Circuit, courts employ a "sliding scale" approach, under which "a
15 stronger showing of one element may offset a weaker showing of
16 another." Id. For instance, "a stronger showing of irreparable
17 harm to plaintiff might offset a lesser showing of likelihood of
18 success on the merits." Id.

19 Plaintiff has not established that it is likely to succeed on
20 the merits or that there are serious questions going to the merits
21 of its claim. The purchase agreement between the parties required
22 that "close of escrow shall occur . . . 60 days after acceptance"
23 of the agreement, or by December 26, 2011. The agreement further
24 states, "Time is of the essence." Plaintiff does not deny that it
25 failed to close escrow by that date. Instead, Plaintiff argues
26 that it should be excused from complying with these requirements,
27 because Defendant offered to extend the date for the close of
28 escrow to January 15, 2012, and because Defendant made false

1 statements to AJTM Financial, the lender from which Plaintiff was
2 attempting to secure funding to complete the purchase of the
3 property, and interfered with Plaintiff's ability to close escrow
4 by that date.

5 Plaintiff has submitted an email dated December 19, 2011 from
6 Defendant's representative, Bonnie Denton,¹ in which Ms. Denton
7 offered

8 to extend the closing date on the purchase agreement
9 . . . to January 15, 2012 for \$103,050.00 additional
10 non-refundable earnest money deposit to pass through
11 to the Seller Immediately. This will make a total of
12 \$150,000 non-refundable money all applicable to
13 purchase price at closing. This extension offer is
14 available to you until 4:00 p.m. CST, December 21,
15 2011.

16 Turner Decl., Ex. 3. On December 21, 2011 at 1:25 p.m., Plaintiff
17 emailed Ms. Denton and her colleague, Jim Duncan, stating,

18 We are requesting the release of \$50,000 more to AG
19 Financial from escrow . . . In saying this, due to the
20 holidays and our new lender having ample time to
21 process this transaction we ask for the date to close
22 be February 11, 2012. . . . We pray the extra \$50,000
23 given which now makes the total \$103,500 shows our
24 confidence in closing this transaction. . . . we ask
25 that the revised addendum and the final response be
26 allowed to holdover until December 27, 2011.

27 Turner Decl., Ex. 4. A minute later, Plaintiff received an
28 "automatic reply" from Jim Duncan stating in part, "I will be out

24 ¹ The Court notes that Bonnie Denton appears to be a
25 "Manager/Broker" at AG Financial and that it is not clear what the
26 relationship is between AG Financial and Defendant. However, it
27 appears that an employee from AG Financial signed the purchase
28 agreement on behalf of Defendant. Accordingly, for the purposes
of this order, the Court will assume that Bonnie Denton and other
employees at AG Financial act as Defendant's agents.

1 of the office until Dec 29th. . . . If you need immediate
2 assistance, please contact Bonnie Denton." Turner Decl. 5.

3 Based on this correspondence, Plaintiff argues that it
4 believed that the parties would finalize a further extension after
5 December 29, 2011. However, there was no enforceable agreement to
6 extend either the offer to extend the closing date or to extend
7 the closing date itself. Plaintiff's email on December 21, 2011,
8 in which it offered a lower amount of additional earnest money and
9 suggested a later closing date, served as a counter-offer. This
10 counter-offer constituted a rejection of Defendant's original
11 offer to extend the closing date, and Defendant's acceptance was
12 necessary before a contract could be formed. See Cal. Civ. Code
13 § 1585 ("An acceptance must be absolute and unqualified, or must
14 include in itself an acceptance of that character which the
15 proposer can separate from the rest, and which will conclude the
16 person accepting. A qualified acceptance is a new proposal.");
17 see also Landberg v. Landberg, 24 Cal. App. 3d 742, 750 (1972)
18 (internal citations omitted) (holding that "basic principles of
19 the law of contract" include: "(1) a valid acceptance must be
20 absolute and unqualified, and (2) qualified acceptance constitutes
21 a rejection terminating the offer; it is a new proposal or
22 counteroffer which must be accepted by the former offeror now
23 turned offeree before a binding contract results.").

24 Plaintiff also argues that Defendant made "false statements"
25 to AJTM, which caused AJTM to withdraw its loan commitment.
26 Plaintiff attaches an email to it from AJTM, in which AJTM states,
27 "Ms. Denton informs us that her department handles foreclosures
28 for the lender. She has had a hard time obtaining the truth in

1 the past from anyone and that the property has already gone
2 through the courts and the property has been foreclosed upon. All
3 she has to do is call the Sheriff's Office, which after our call
4 she intends to do and activate the eviction." Turner Decl.,
5 Ex. 2. Plaintiff has not established that it is likely that it
6 will be able to establish that these statements are false, because
7 it also presents evidence that Defendant had filed an unlawful
8 detainer complaint in state court and that, prior to Ms. Denton's
9 statements, "a Judgment awarding Defendant possession of the
10 Subject Property was filed." Turner Decl. ¶ 15.

11 Accordingly, Plaintiff's application for a temporary
12 restraining order and order to show cause for preliminary
13 injunctive relief is DENIED. Plaintiff may file a properly
14 noticed motion for a preliminary injunction, pursuant to Civil
15 Local Rules 65-2 and 7-2.

16 IT IS SO ORDERED.

17
18 Dated: January 13, 2012



CLAUDIA WILKEN
United States District Judge